No. 48885-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KEVEN SCHOENFELDER and EMILY SCHOENDFELDER, et al,

Respondents,

v.

ROBERT LARSON and JENNIFER LARSON,

Appellants,

v.

DAVID KING AND JANE DOE KING, et al,

Third Party Defendants

BRIEF OF RESPONDENTS

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INTRODUCTION

Respondents/plaintiffs are the owners of four homes all served by the same private road providing access from Kopachuck Drive NW. The homes are occupied by Kevin and Emily Schoenfelder, Kevin and Pam Bergman, Deryck and Linda Watermeyer and Marilyn Lepape.[1] The road, which was paved 50 years ago when the first of plaintiffs' respective homes was built, crosses property purchased by appellants/defendants Robert and Jennifer Larson in 2015. The plaintiffs are the beneficiaries of an express easement (Trial Exhibit 10) that grants them the right to use the 10-foot paved road for ingress and egress to their homes.

The road is unenclosed, long, (in excess of 700 feet – longer than two consecutive football fields), narrow (the width of the blacktop is approximately 10 feet) and has curves and hills that limit site distance as you travel the road. Because of the narrow width of the paved area, it cannot accommodate two oncoming vehicles to pass and remain on the

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[1] Kevin and Emily Schoenfelder and Ken and Pam Bergman, both own and reside on their properties and are plaintiffs in the underlying action and respondents in this appeal. (CP 1421, Findings 1 and 2.) Though Deryck and Linda Watermeyer reside in the home, they have conveyed title to their property to the Watermeyer Living Trust. (2/3/16 RP 226-27.) Deryck and Linda Watermeyer are thus plaintiffs/respondents in the action as trustees for this living trust. (CP 458-63, 515-26; 1421, Finding 3.) Similarly, Marilyn Lepape resides in the home that is a subject of this appeal, but title to the property was transferred to the Harry and Marilyn Lepape Survivor's Trust Dated 8/15/12. (2/3/16 RP at 190-91.) Marilyn Lepape and her daughter Jeanne Wiener are plaintiffs/respondents in the action as trustees for the survivor's trust. (CP 458-63, 515-26 1422, Finding 4.)

paved area. Nonetheless, for decades, this private road adequately provided ingress and egress for these four homes because those using the road have utilized discrete areas along and adjoining the paved road as "turnouts." When two vehicles meet, one of the vehicles will pull into a "turnout" area until the other successfully passes. Without the turnouts, oncoming vehicles would be forced to back up hundreds of feet along the narrow, curving road until they reached either Kopachuck Drive or plaintiff Lapape's home.

This lawsuit was commenced after Larson's real estate agent placed stakes along the edge of the road and it was announced that Larson intended to enclose the 10-foot paved road with a fence at the road's edges. The stakes blocked the turnout areas and interfered with safe access for the plaintiffs to and from their homes. It also resulted in the local fire department announcing that, as long as the stakes remained, emergency vehicles would not access plaintiffs' property.

Following a trial, the Honorable Gretchen Leanderson found that plaintiffs hold prescriptive rights to continue use of two of the historically used "turnouts." The trial court also interpreted the plaintiffs' express easement and found that construction of a fence along the road edges would interfere with plaintiffs' enjoyment of the easement in a manner

consistent with the easement's intent and purpose. The trial court thus enjoined Larson from constructing a fence within 2½ of the road edges.

The trial court's decision should be affirmed. Its findings and conclusion are the product of thoughtful application of the relevant law to the substantial evidence presented at trial.

STATEMENT OF THE CASE

Larson owns approximately 17.5 acres located at 10348 Kopachuck Drive property. Larson purchased the property in January 2015 from third-party defendants David King, Patricia King, Barbara King and John King, who, in turn, acquired the property from their parents John and Doris ("Bonnie") King. (CP1422, Findings 5, 6.)

One of the parcels on the Larson/King property is improved with a cabin. John and Doris King resided in the cabin during the summer months from approximately 1953 to the mid-1900s. (CP 1423, Finding 8.) Two of the parcels (tax parcel nos. 012109-4-010 and 012116-1-013) are improved with a private asphalt road, but are otherwise undeveloped and unenclosed. The asphalt road is approximately 10 feet wide, with curvy turns and in excess of 700 feet long. The road provides access not only the cabin, but has also provided the exclusive means of access to plaintiffs' properties since at least the 1960s. (CP1422-23, Findings 7, 8.)

The Schoenfelder, Watermeyer and Bergman properties are

benefitted by, and the Larson's property is encumbered by an express easement recorded on August 7, 1996 under Pierce County Auditor File No. 9608070182 ("1996 Easement").[2] (CP 1423, Finding 9; Trial Ex. 10.) The 1996 Easement grants ingress and egress from Kopachuck Drive to the benefitted properties over and across the Road. Specifically the 1996 Easement grants the benefitted properties "a non-exclusive surface easement for ingress on five (5) feet on each side of the center line across the existing black-topped road." (*Id.*)

Though the express easement at issue in this appeal was granted in 1996, plaintiffs' easement rights and historical use of the road by plaintiffs and their predecessors long precedes the 1996 Easement. The road was first established (though not yet paved) and easement rights first established in 1945 (Trial Exhibit 2; 2/3/16 RP at 192-94.)

Until 1965, the private road served only a single cabin (owned by Frederick Marr and his family), which cabin was used only in summer months or on weekends. (2/3/16 RP at 194, 196-97.) Frederick Marr paved the road in approximately 1965 when he constructed the first permanent home (nearby the cabin) in plaintiffs' community. (2/3/16 RP at 198.) The

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[2] The Lepape property is benefitted by an express easement to use the road as granted in the warranty deed recorded under Pierce County Auditor File No. 8105080221 and easements previously recorded under Pierce County Auditor File Nos. 1364311. (CP 1423, Finding 9, Trial Exs. 2, 4, and 6.)

home built by Marr in approximately 1965 is now owned by Bergman. (*Id.*, CP 1421, Finding 2.) When the Kings purchased the property improved with the road from Marr, the property was conveyed subject to an easement for ingress and egress to the benefit of the plaintiffs' property. (Trial Exhibits 1, 2, 4.)

Schoenfelder was next to build a permanent home when they purchased their property (with the benefit of an express access easement) in 1986, moving in in 1987. (CP 1421, Finding 1; Trial Ex. 8.) Lepape purchased their property in 1968 (also with the benefit of an express easement), at which time they placed a mobile home on the property so that they could live on the property in the summer time. Lepape thereafter began construction of a permanent home in 1994 and made that home their permanent residence in 1995. (CP 1422, Finding 4, Trial Exhibit 6.) Watermeyer purchased the cabin property from members of the Marr family in 1996 and made the cabin property their permanent home until they constructed a new home in 2003. (CP 1421, Finding 3.) Thus, by 1996, the unpaved road built around 1946 to serve a single summer cabin had evolved to serve four homes permanently occupied by four families, in addition to the King family cabin. (CP 1421-23, Findings 1-4, 7.)

There is no dispute that the 10-foot wide paved road is not wide enough for two vehicles to pass. As a result, the regular driving practice

on the driveway – dating back to the 1960's – has been that, when two vehicles meet, one of the vehicles will pull into a "turnout" area off the paved road until the other successfully passes. Without the turnouts, oncoming vehicles would be forced to back up hundreds of feet along the narrow, curving road until they reached either Kopachuck Drive or plaintiff Lapape's home. Of course, backing up for such a great distance under such circumstances is neither feasible nor safe. As a result, plaintiffs have consistently used the turnout areas when two oncoming vehicles meet. (CP 1424-26, Findings 11-13.)

The King family sold their property, including the property encumbered by the private driveway, to Larson in 2015. Larson wished to build a new home in area encumbered by the road. Their planned development was thus wholly dependent upon plaintiffs' voluntary agreement to move the road. (CP 1422, 1431, Findings 5, 27.)

Though plaintiffs were amenable to a new road, if safe and reasonable, they did not accept the road as proposed by Larson. (2/3/16 RP at 85-86, 103-06, 209-11.) Unfortunately, Larson, through their real estate agent, responded through actions intended to strong-arm plaintiffs into acquiescence. Those tactics culminated with stakes being placed at the edge of the roadway, a call by the agent to the local fire district, and announcement by the fire district that emergency services would not be

provided to plaintiffs if the stakes remained or any other fence was constructed along the roads' edges. (Trial Exhibits 35, 34, 36, 39, 46; 2/4/16 RP at 46-56, 58-59; 201-03; 2/3/16 at 93-98, 100-102; 2/10/16 RP at 72-76, 78-87.) Those actions led to this lawsuit. (CP 1-8.)

Prior to trial, the trial court determined on summary judgment that plaintiffs have a right to use the paved driveway crossing Larson's property pursuant to the 1996 Easement. (CP 667-70.) The trial court determined that the express easement limits the width of the road to 10 feet and the turnout areas used by plaintiffs are not within the scope of the express easement. (*Id.*) Plaintiffs' right to use the turnout areas to pass oncoming vehicles thus depended on whether they hold a prescriptive easement to those turnout areas, which issue remained for trial. (*Id.*) With regard to fencing along the edges of the paved road, the trial court held that, whether scope of the express easement authorizes or precludes a fence located along or immediately near the road edges, also remained an issue to be decided at trial. (*Id.*; CP1420.) The matter proceeded to trial, culminating in Findings of Fact and Conclusions of Law (CP 1419-1449) presented for review on this appeal.

ARGUMENT

A. Standards Of Review.

Larson's appeal is primarily founded upon challenges to the trial

court's factual findings. A trial court's findings of fact will not be reversed if supported by substantial evidence. *Bering v. SHARE,* 106 Wash.2d 212, 220, 721 P.2d 918 (1986). Substantial evidence exists if a rational, fair-minded person would be convinced by it. *Id; Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). In applying this deferential standard, a court views all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Sunderland Family Treatment Services. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995). Even if there are several reasonable interpretations of the evidence, it is substantial if it reasonably supports the court's findings. *Fred Hutchinson Cancer Research Ctr. v. Holman,* 107 Wash.2d 693, 713, 732 P.2d 974 (1987). Thus, the reviewing court will not substitute its judgment for that of the trial court even though it might have resolved a factual dispute differently. *Sunnyside*, 149 Wash.2d at 879–80; Lamm v, McTighe, 72 Wn.2d 587, 589, 434 P.2d 565 (1967).

If the trial court's findings of fact have substantial supporting evidence, the findings are reviewed de novo to determine if the findings of fact support the conclusions of law. *Landmark Dev., Inc. v. City of Roy*, 138 Wash.2d 561, 573, 980 P.2d 1234 (1999). Conclusions of law are reviewed de novo. *Sunnyside*, 149 Wash.2d at 880, 73 P.3d 369.

B. The Substantial Evidence In The Record Supports The Trial Court's Prescriptive Easement Findings.

To establish a prescriptive easement, the persons claiming an easement must use another person's land for 10 years and show that the use was (1) in an open and notorious manner; (2) continuous and uninterrupted; (3) over an uniform route; (4) adverse to the landowner; and (5) occurred with knowledge of such owner at a time when he was in law to assert and enforce his rights. *Gamboa v. Clarke,* 183 Wn.2d 38, 53, 348 P.3d 1214 (2015).

Whether a claimant has satisfied the elements of a prescriptive easement is generally a mixed question of fact and law. *Id.* at 44. The existence of essential facts is a question of fact reviewed for substantial evidence. *Lee v. Lozier*, 88 Wn. App. 176, 181, 945 P.2d 214 (1997). Whether the facts, as found, establish a prescriptive easement is a question of law. *Id.*

Larson only challenges the trial court's findings with regard to the last two elements – that plaintiffs' use of Larson's property was adverse and that Larson's predecessors, the Kings, had knowledge of plaintiffs' use. Accordingly, the legal analysis will focus on those two elements.

The question of adverse user is a one of fact and the findings of the trial court on this issue "will not be disturbed where credible evidence and

legitimate inferences therefrom sustain it." *Cullier v. Coffin,* 57 Wn.2d 624, 628, 358 P.2d 958 (1961). *See also, Northwest Cities and Gas Co. v. Western Fuel Co.,* 13 Wn.2d 75, 84, 123 P.2d 771 (1942). To satisfy the adverse or hostile use requirement does not require a showing of animus, ill will, or that plaintiffs engaged in confrontational behavior. *810 Properties v. Jump*, 141 Wn. App. 688, 700, 170 P.3d 1209 (2007); *El Cerrito v. Ryndak*, 60 Wn.2d 847, 854, 376 P.2d 528 (1962). Rather, it imports that the claimant possess or use the property as a claim of right -- as owner, in contradistinction to possessing or using the real property in recognition of or subordinate to the title of the true owner *Id.*; *Lingvall v. Bartmess,* 97 Wn. App. 245, 250, 982 P.2d 690 (1999). There is no requirement that the adverse user give the owner express notice of a hostile claim. *Gray v. McDonald*, 46 Wn.2d 574, 579-80, 283 P.2d 135 (1955); *Northwest Cities and Gas Co.,* 13 Wn.2d at 87-88. Likewise, plaintiffs need not show actual knowledge by the property owners. This element can also be satisfied through demonstration of constructive knowledge if the use was sufficiently open and notorious. *Pedersen v. Washington State Dep't of Transp.*, 43 Wn. App. 413, 421-22, 717 P.2d 773 (1986); *Northwest Cities and Gas Co.,* 13 Wn.2d at 90.

Larson correctly notes that, if the claimant's use is permissive, it is not hostile. Under certain limited factual scenarios, Washington courts

will presume permissive use. The circumstances in which courts will apply this presumption were recently clarified in *Gamboa v. Clark.*

> First, the presumption applies to cases involving unenclosed land.... Second, the presumption applies to enclosed or developed land cases in which it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence. Third, the presumption applies when the evidence demonstrates that the owner of the property created or maintained a road and his or her neighbor used the road in a noninterfering manner.

183 Wash. 2d 38, 44, 348 P.3d 1214, 1217-18 (2015).[3]

In this case, the trial court found that the parcels upon which the road and turnout areas lie are unenclosed and, other than the road, undeveloped. (CP 1423, FOF 8.) On that basis alone, trial court applied the presumption of permissiveness. (CP 1437, Conclusion 11.) The trial court did not find that the evidence established an inference of neighborly acquiescence, nor did it apply the presumption on that basis. The trial court likewise did not find that the owner of the property (Larson's

[3] The Court in *Gamboa* noted that earlier cases hold that use of another's property for the 10-year prescriptive period without formal permission creates a presumption that the use was adverse. *See Northwest Cities and Gas Co.,* 13 Wn.2d at 85; *Cullier v. Cofin,* 57 Wn.2d at 626-27. In *Cullier*, however, the Court clarified that a more accurate statement is that the claimant's unchallenged use of another's property for the 10-year prescriptive period allows an inference of adverse use that may be considered along with other circumstances. *Cullier*, 57 Wn.2d at 627. The Court in *Gamboa* acknowledged this clarification, but chose not to resolve whether an unchallenged use created a presumption of adverse use or merely inferences. *Gamboa,* 183 Wn.2d at 46, 50.

predecessors) created or maintained a road and his or her neighbor used the road in a noninterfering manner.[4]

Of course the presumption of permissive use is a rebuttable presumption. It is defeated "when the facts demonstrate (1) 'the user was adverse and hostile to the rights of the owner, or (2) 'the owner has indicated by some act his admission that the claimant has a right of an easement.'" *Gamboa*, 183 Wn.2d at 51-52. Evidence that the claimant "interfered with the owner's use of the land in some manner" will establish adversity and defeat the presumption of permissive use. *Id.* at 52.

1. The substantial evidence supports the trial court's findings that plaintiffs' use of the turnout areas was adverse and that the owners (King) had knowledge of the adverse use in the prescriptive period.

Larson first argues that the trial court's finding that Mr. King blocked access to the turnout areas as an assertion of King's ownership rights is not supported by the substantial evidence; and that the finding is critical to the trial court's prescriptive easement legal conclusions. The

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[4] Recall that the roadway here was paved by plaintiffs' predecessor in interest Frederick Marr, when he constructed a permanent home on the property now owned and occupied by the Bergmans. (2/3/16 RP at 198.) In 1968, Frederick Marr sold parcel encumbered by the road through a real estate contract to the King family and title was conveyed through a fulfillment statutory warranty deed. (Trial Exhibit 4.) This deed reserved an easement for the benefit of Marr's property (with the possible exception of the property now owned by Watermeyer) over the now existing roadway that Marr had previously paved. (*See Id.*) Thus it was plaintiffs' predecessors that paved the road that plaintiffs have now used for decades. Furthermore, the particular prescriptive easement at issue here is not for use of a roadway itself, but rather use of turnouts adjacent to the roadway, which were created by plaintiffs' use.

argument fails on two levels. First, Larson misapplies the law. While Mr. King's motive in placing the rocks can be dispositive on the issue of adversity, proof of King's motives is not required to defeat the presumption. Regardless, the substantial evidence and unchallenged findings of fact support the finding.

a. King's motives regarding the rocks are not dispositive on the issue of adverse use.

Larson challenges the trial court's factual findings (Findings 16, 19, 21) that King placed the rocks in the turnout areas for the purpose of blocking plaintiffs' use of these turnouts; and that, once the rocks were removed or damaged, his failure to replace the rocks constituted an admission by King that plaintiffs' had a right to use the turnouts. (Appellants' Brief at pp. 14-17.) As discussed in the following section, the circumstantial evidence in the record does support the inferences the trial court drew from the evidence to reach its findings. But even if the findings concerning King's motive was not supported by the evidence, it would not be fatal to the trial court's finding that plaintiffs' use of the turnouts was adverse. Nor would it be fatal nor to the trial court's legal conclusion that a prescriptive easement exists.

Again, the presumption of permissive use that the court applied to this unenclosed property is a rebuttable presumption that is defeated

"when the facts demonstrate (1) 'the user was adverse and hostile to the rights of the owner, ***or*** (2) 'the owner has indicated by some act his admission that the claimant has a right of an easement.'" *Gamboa, supra,* 183 Wn.2d at 51-52 (emphasis added).[5] Larson presents no challenge with regard to the trial court's findings related to the first independent means of rebutting the presumption – hostile use by the claimant. Instead, Larson exclusively challenges the factual findings that relate to the second means of rebutting the presumption – admission by the servient owner. Larson argues that the evidence was insufficient to determine King's motives, and thus cannot support a finding that his conduct represents an admission that plaintiffs had a right to use the turnouts.

But irrespective of these challenged findings, the presumption may, independently, be rebutted with evidence that the claimant "interfered with the owner's use of the land in some manner." *Gamboa, supra,* 183 Wn2d at 52. In such case, the motives of the servient owner (King) are irrelevant to this inquiry. The evidence need only establish that the easement claimants (the plaintiffs in this action) interfered with the

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[5] At page 19 of Appellants' brief, Larson asserts that, to establish adversity, plaintiff is required to establish both interference and evidence of conduct constituting an admission by the owner. This is a misstatement of the law. An easement claimant need only meet one of these standards of proof to overcome the presumption. *Gamboa,* 183 Wn. 2d at 51-52; *Cole v. Laverty,* 112 Wn. App. 180, 186, 49 P.3d 924 (2002). In this case, the substantial evidence and findings support both interference by plaintiffs and evidence of an admission by the servient owner (King), but again, only one is required.

servient owner's (King's) use of the turnout areas in some manner. In this case, plaintiffs' interfered with King's use of his property when they deliberately removed the large rocks, which temporarily blocked their use of the turnouts, and then continued use of the turnout areas.

The unchallenged Findings of Fact, now verities on appeal,[6] clearly establish interference by plaintiffs with King's use of the turnout areas. These unchallenged findings include:

> 7. The Schoenfelder Property, Watermeyer Property, Bergman Property and Lepape Property are all served by the same, single private asphalt road that is approximately 10 feet wide, with curvy turns and in excess of 700 feet long ("Road"). The Road crosses two of the six tax parcels comprising the Larson Property, specifically Pierce County Assessor Tax Parcel Nos. 012109-4-010 and 012116-1-013, which parcels are legally described in the attached Exhibit 2 ("Encumbered Larson Parcels"). The Road has been used for ingress and egress from Kopachuck Drive to plaintiffs' properties since at least the 1960's.
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> 8. One of the tax parcels on the Larson Property is improved with a cabin. The other five tax parcels, including the Encumbered Larson Parcels, are unenclosed and, other than the Road, undeveloped. From approximately 1953 to sometime after the mid-1990s, John and Doris King, the deceased parents of third-party defendants David, Patricia, Barbara and John King, resided in the summer months in the cabin on the Larson Property. The Kings would access their cabin from Kopachuck Drive using the

[6] Unchallenged findings of fact are verities on appeal. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 556, 132 P.3d 789 (2006).

northeastern portion of the Road. John King would frequently walk along the portions of the Road south and west of the cabin leading to plaintiffs' properties.

9. The Schoenfelder Property, Watermeyer Property and Bergman Property are benefitted by, and the Encumbered Larson Parcels are encumbered by an express easement recorded on August 7, 1996 under Pierce County Auditor File No. 9608070182("1996 Easement"). (Trial Ex. 10.) The 1996 Easement grants ingress and egress from Kopachuck Drive to the benefitted properties over and across the Road. Specifically the 1996 Easement grants the benefitted properties "a non-exclusive surface easement for ingress on five (5) feet on each side of the center line across the existing black-topped road." The Lepape Property is also benefitted by and the Encumbered Larson Parcels are encumbered by an express easement to use the Road as granted in the warranty deed recorded under Pierce County Auditor File No. 8105080221 and easements previously recorded under Pierce County Auditor File Nos. 1364311 and (Trial Exs. 2, 4, and 6.)

10. For years, the Road has been used by four families, with many vehicles going up and down the Road between plaintiffs' properties and Kopachuck Drive, including vehicles driven by family members, family member's guests, delivery and services persons and emergency service vehicles. The Lepapes have used the road since 1968; the Schoenfelders since 1987, the Watermeyers since 1986; and the Bergmans since 2004.

11. The 10-foot wide Road cannot accommodate two oncoming vehicles to pass and remain on the paved area. As a result, when two oncoming vehicles would meet on the Road, the routine practice was that one of the vehicles would pull entirely off the paved Road into one of four "turnout areas" until the other successfully passed. The four "turnout areas" are located on the Encumbered Larson Parcels, but are

outside the 10-foot surface easement described in the 1996 Easement. The "turnout areas" are depicted, consistent with the turnout areas depicted on Trial Exhibits 23 and 23A , on the attached Exhibit 3 with hatched areas that are labeled A, B, Y and Z....

* * *

12. The above-described "turnout areas" were routinely used by the plaintiffs' four families, to allow oncoming vehicles meeting on the Road to pass. The turnout areas were used openly and notoriously by plaintiffs, or to accommodate passing by others. The road is also routinely used by plaintiffs' family members, friends of family members, milkmen, newspaper carriers, landscapers, contractors or other workmen hired by plaintiffs, Federal Express and other delivery services. The type of vehicles that have been driven into the turnout areas range from small vehicles, such as a Toyota Prius, driven by Linda Watermeyer, to large vehicles, such as a Chevrolet Suburban, driven by Kevin and Emily Schoenfelder. At times, some of plaintiffs have also pulled a boat trailer attached to their vehicle into a turnout area to allow an oncoming vehicle to pass. The typical practice of those routinely using the turnout areas would be to pull their car entirely off the Road and into the turnout area to allow the oncoming vehicle to stay on the Road and pass.

13. As a group, Plaintiffs' use of the turnout areas, as well as their successors-in-interest's use, has been continuous and uninterrupted. Use of the turnout areas has varied at times per month based on variables such as the time of day and season, but they have been used frequently by four families to accommodate a lot of vehicles going up and down the Road. Use of the turnout areas changed as the families' schedules changed. But the evidence established that each plaintiff routinely used the turnout areas, either by pulling into one of the turnout areas to allow others to go by or, as in the case of Marilyn Lepape, by waiting on the Road for the

oncoming vehicle to pull into a turnout area in order to continue on the Road and pass that vehicle. The turnout areas were used by the collective community residing at plaintiffs' respective properties to accommodate each community member's (and their respective guests) ingress to and egress from their respective property.

14. The testimony established that John King, Sr., upon entering the Road from Kopachuck Drive, would honk at the top of the Road and wait for an indication that either no one was on the Road or that any oncoming vehicles had moved off the Road, inferring that Mr. King knew it was not possible for two cars to pass each other on the Road and that vehicles traveling from plaintiffs' property toward Kopachuck Drive would pull off the Road to accommodate oncoming vehicles. The testimony by some of the King children established that they also knew that the Road served four families residing on plaintiffs' respective properties and that the Road was not wide enough for two meeting cars to pass each other.

15. The testimony of Dr. Kevin Schoenfelder and others established that, on one day some time before July 13, 1994,[7] multiple large rocks suddenly appeared in the turnout area referred to as the meadow area and labeled B on Exhibit 3. The large rocks had not been there before. These large rocks were placed near the edge of the Road along the entire length of the meadow area such that they prevented plaintiffs and others from entering the meadow area with a vehicle or otherwise use the meadow area as a turnout to allow cars to pass.

17. Dr. Schoenfelder immediately removed two of the large rocks, one on each end of the meadow area,

[7] Dr. Schoenfelder testified that he recalls that the rocks appeared in the early 1990s, approximately 1992. (2/4/16 RP at 75.)

to again allow access to the meadow area for use as a turnout. Upon removal of the large rocks, plaintiffs' family members continued to use this meadow area as a turnout to allow oncoming vehicles to pass. Dr. Schoenfelder subsequently used his Suburban, and others used their vehicles as well, to pound the remaining large rocks into the ground in order to make the area available for use as a turnout without damage the underside of their cars. The Court finds that plaintiffs' testimony was particularly credible on the large rocks being placed along the edge of the meadow area one day, at least two of the large rocks being immediately removed and the others pounded down. The photographs and video (Trial Exs. 14, 20.A) corroborate the testimony and more current pictures (Trial Ex. 24) corroborate that the large rocks are now either gone or can only barely be seen.

18. Dr. Schoenfelder testified that large rocks were also placed in the turnout area labeled as A on Exhibit 3 at the same time the large rocks were placed in the meadow area. He testified that these rocks were not as large as the large rocks placed in the meadow area, but that they nonetheless interfered with use of this area labeled A as a turnout. Dr. Schoenfelder testified that he did not remove these rocks, as he did with the large rocks in the meadow area, but instead was able to drive his Suburban over the rocks to push them into the ground and make the area accessible as a turnout again. The Court finds quite credible Dr. Schoenfelder's testimony with regard to placement of the rocks in this area and his subsequent actions to drive the rocks into the ground so that they were no longer an impediment to access the turnout area. (Emphasis added.)

(CP 1422-1428.)

There is substantial evidence that large rocks were, indeed, placed in two of the turnout areas, including the large meadow area. In addition to

Dr. Schoenfelder's testimony described above and the testimony of other plaintiffs, three of Mr. King's children, Barbara, David and John Jr., testified that they also observed the rocks. (CP 1115-16, 1120-22, 1128-29;[8] 12/10 RP at 182, 196.)

The rocks were not randomly placed, but were symmetrically placed at the edge of the grass next to the road; and they were large, measuring approximately 9 inches high, 12 inches wide and 14- 15 inches long. (Trial Exhibit 14; 2/3/16 RP at 75-76. *See also* 2/10/15 at p. 18-20.) The meadow area in which the rocks appeared was maintained by King personally or through hired maintenance staff. (CP 1114-15, 1120, 1126-27.) None of the plaintiffs placed the rocks in the turnout areas. (2/3/10 RP at 81, 121, 200.) While they did not know for sure, Mr. King's children (like plaintiffs) assumed that the rocks were placed in the meadow area by their father or by his maintenance staff. (CP 1115-16, 1121-22, 1129-30. *See also* 2/10/16 RP at 183-84, 196-97) Barbara and David both recalled that their father had expressed concern about trespassers and dumping in that area. (CP 1121-22, 1129-30; 2/10/16 RP at 183-85, 196-97). Because of that expressed concern, both assumed that this concern lead to the placement of the rocks in the meadow. *Id.* The trial court drew the same

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[8] In addition to live testimony at trial, testimony of Barbara King, David King and John King, Jr. was presented through deposition testimony designated pursuant to CR32(A)(2). (CP 1109-1131; 2/10/16 RP at 2-3, 94.)

inferences from the circumstantial evidence presented and found that Mr. King, either personally or through the maintenance staff placed the rocks in the turnout areas. (CP 1427, Finding 16.)

The evidence also established that these large rocks placed in two of the turnout areas, due to their spacing and height, interfered with plaintiffs' use. (CP 1426-28, Unchallenged Findings 15, 18. *See also,* Trial Exhibit 14, 2/3/16 RP at 76, 184; RP 2/10/16 at 47-49.) Until Dr. Schoenfelder removed the two end rocks, thus allowing vehicles to enter at either end and drive around the remaining rocks, these areas were obstructed for use as turnouts. (CP 1426-27, Unchallenged Findings 15, 17; 2/3/16 RP at 76-80, 185-85.) After Dr. Schoenfelder removed the two end rocks, the plaintiffs continued to routinely use these areas to turnout and allow oncoming vehicles to pass. (1427-28, Unchallenged Findings 17, 18; 2/3/16 RP at 76-77, 79, 81 184-85; 2/10/16 RP at 47-49.) Beyond removing the end rocks, Dr. Schoenfelder addressed the remaining rocks by periodically driving the tire of his suburban over the remaining rocks to pound them into the ground over time; eventually (by 1999) the rocks were no longer even visible. (CP 1427-28, Unchallenged Findings 17, 18; 2/3/16 RP at 76-80.)

The trial court appropriately found from the above evidence that "plaintiffs' use was adverse to the rights of the owners and interfered with

the owners' use" of the two turnout areas. (CP 1429, Finding 21. *See also* CP 1428, Finding 19.) Regardless of reason for the rock placement – be that to preclude plaintiffs' use, prevent access for dumping, or even for aesthetic landscaping – plaintiffs' interfered with King's use of the property in order to continue their routine use of these areas for vehicle turnouts. This is sufficient to defeat the presumption of permissiveness. *Gambo, supra,* 183 Wn.2d at 52 ("For a claimant to show that land us is 'adverse and hostile to the owner,' the claimant must set for the evidence that e or she interfered with the owner's use in some manner."). *See also, 810 Properties, supra*, 141 Wn. App. at 700–02.

b. The unchallenged Findings and substantial evidence in the record support the trial court's finding that King placed rocks to block use of the turnout areas.

With regard to Larson's challenge to the trial court's finding on King's motive for placing the rocks, Larson argues that it is not supported by evidence, but is speculation. More specifically, Larson argues that that trial court had to speculate that King placed the rocks in the turnout area, the reason he placed the rocks in the turnout areas and that failure to respond to removal of the rocks constituted an admission. It is on this basis that Larson assigns error to the following findings

> 16. The circumstantial evidence established that John King Sr. placed the large rocks, or caused the

large rocks to be placed in the meadow area. The plaintiffs testified that they did not place large rocks in the meadow area. Members of the King family testified that Mr. King had expressed concern about people trespassing on to the meadow area, which he watered and had retained landscapers to mow. Mr. King Sr.'s children testified they remember observing the large rocks in the meadow area and they testified that, based upon his expressed concerns, they believed their father, Mr. King Sr., either personally placed the large rocks in the meadow area or had a landscaper place the large rocks.

* * *

19. No further efforts were taken to replace any of the large rocks. The evidence establishes that, by placing the large rocks in the turnout areas, Mr. King Sr. took a stance to block access to these two turnout areas. Dr. Schoenfelder and others effectively interfered with Mr. King Sr.'s efforts to block access to the turnout areas and their actions to clear the turnout areas for continued use were adverse to and asserted as superior to Mr. King's rights as the owner of the property upon which the turnouts are located. Thereafter plaintiffs continued regular use of the two turnout areas to allow oncoming vehicles to pass, which actions, in light of the prior placement of the large rocks, were also adverse and asserted as superior to the rights of the Kings, as property owners.

* * *

21. The Court finds that plaintiffs have proven by the preponderance of the evidence that, for a period of more than ten years, plaintiffs have used the turnout areas labeled A and B on Exhibit 3 in a manner that is open, notorious, continuous and uninterrupted, over a uniform route, with knowledge of the owners of the Larson Property at a time they were able to enforce their rights as owners, and that plaintiffs' use of these turnout areas was adverse to the rights of the owners and interfered with the

> owners' use of the Encumbered Larson Parcels. The Court thus finds that plaintiffs' have a prescriptive easement over the two turnout areas labeled A and B on Exhibit 3.

(CP 1427-29.)

But there is in the record substantial evidence to support the above findings. With regard to placement of the rocks, none of the plaintiffs placed the rocks in the turnout areas, nor did any of Mr. King's children. (2/3/10 RP at 81, 121, 200; 1115-16, 1121-22, 1129-30.) King's children, who had observed the rocks, believed that their father or his maintenance staff placed the rocks in the meadow. (CP 1115-16, 1121-22, 1129-30; 2/10/RP at 182-85, 196-98.) Of course, this was a reasonable inference for his children to draw from the circumstances, since King owned the land at this time and King, personally or through the maintenance staff, mowed and maintained the meadow area.[9] (CP 1114-15, 1120, 1126-27.) The rocks were also symmetrically placed at the edge of the grass next to the road, indicating that their placement there was a thoughtful act. (Trial Exhibit 14; 12/3/16 RP at 75-76.) It was reasonable for the court to infer from the evidence (as did King's children) that Mr. King, the person who

[9] It does not matter that the Kings also used the turnout areas. The claimant does not need to be the only person using the turnout areas. Rather, the relevant inquiry is whether the users exercised that right under a claim of right independent of use by the owners. *Lingvall, supra,* 97 Wn. App. at 252; *Lund v. Johnson,* 162 Wash. 525, 530, 298 Pac. 702 (1931).

owned and maintained the property, caused the rocks to be placed in the turnout areas.

There is also substantial evidence in the record to support the trial court's finding that King placed the rocks in the turnout areas to preclude entry. Barbara and David King both testified that they recalled their father expressing concern about trespassers and dumping in that area. (CP 1121-22, 1129-30; 2/10/16 RP at 183-85). Barbara and David inferred from Mr. King's express concern that his concern for trespassers lead to the placement of the rocks in the meadow. *Id.* The Unchallenged Findings establish that the rocks did, in fact, preclude entry until Dr. Schoenfelder took action to remove some of the rocks and pound others into the ground with his Suburban. The trial court inferred from this evidence that "Mr. King Sr. took a stances to block access to these two turnout areas." (CP 1428, Finding 19.)

Finally, there is substantial evidence in the record to support the trial court's inference from the circumstantial evidence that Mr. King's decision not to replace the rocks, once removed and pushed into the ground, constitutes and admission of plaintiffs' right to use the turnout areas. (CP 1428, Finding 19.) The substantial evidence in the record supports a finding that Mr. King knew the rocks were removed and altered. Beyond the evidence that he owned, mowed and maintained this

area, the unchallenged findings establish that Mr. King would frequently walk along the portions of the Road south and west of the cabin leading to plaintiffs' properties. (CP 1423, Unchallenged Finding 8.) Thus, he was in a position to observe the effects of Dr. Schoenfelder's actions regarding the rocks, as well as plaintiffs' ongoing use of the turnout areas, which the court found to have occurred for many years and to be in an open and notorious and continuous and uninterrupted manner. (CP 1425, Unchallenged Findings 12, 13.)

Review of appellants' brief reveals that Larson's challenges to the trial court's factual findings may more accurately characterized as challenges to the inferences that the trial court drew from the evidence (including inferences drawn from the numerous unchallenged findings of fact). Though he does not challenge any of the trial court's decisions regarding admission of evidence, he unilaterally characterizes evidence as speculative. Larson seems to discount the value of circumstantial evidence and, without citation to authority, effectively asserts that direct evidence is required to support the trial court's findings.

It is true that a verdict cannot be based on mere theory or speculation, *Brashear v. Puget Sound Power & Light Co.,* 100 Wash.2d 204, 209, 667 P.2d 78 (1983) (quoting *Hojem v. Kelly,* 93 Wash.2d 143, 145, 606 P.2d 275 (1980)), but a verdict does not rest on speculation or

conjecture when it is based upon reasonable inferences drawn from circumstantial facts. *Thompson v. Grays Harbor Community Hosp.,* 36 Wn. App. 300, 304, 675 P.2d 239 (1983); *State Farm Mut. Ins. Co. v. Padilla,* 14 Wn. App. 337, 540 P.2d 1395 (1975); *Harrison v. Whitt*, 40 Wn. App. 175, 177, 698 P.2d 87, 88 (1985). Circumstantial evidence is as good as direct evidence. *State v. Gosby,* 85 Wn.2d 758, 766–67, 539 P.2d 680 (1975).

"The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99–100, 123 S. Ct. 2148, 2154, 156 L. Ed. 2d 84 (2003), *quoting Rogers v. Missouri Pacific R. Co.,* 352 U.S. 500, 508, n. 17, 77 S. Ct. 443, 1 L.Ed.2d 493 (1957). Thus, circumstantial evidence may support findings with regard to a person's intentions or motives. *Desert Palace, Inc.*, 539 U.S. at 99–100. Even under the higher criminal standard, when intent is an element of the crime, "intent to commit a crime may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability." *State v. Woods*, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991); *State v. Couch,* 44 Wn. App. 26, 30, 720 P.2d 1387 (1986).

The trial court's findings are well supported by the substantial evidence in the record and the inferences that may be reasonably drawn from that evidence.

2. The trial court's findings support plaintiffs' prescriptive easement to use the turnout areas.

Finally, Larson argues that, even if all the trial court's findings of fact are accepted as true, these facts cannot support a finding that plaintiffs' use of the turnout areas was adverse or hostile.

Larson first argues that an inference of permissive use applies when a court can reasonably infer the use was permitted by neighborly sufferance or acquiescence. Of course, as noted earlier, the trial court did not find neighborly sufferance in this case and, thus, did not apply any presumptions on that basis. The factual findings the court enters are only those it determines have been established by the evidence. The court is not required to enter negative findings or findings that a certain fact has not been established. *Gen. Indus., Inc. v. Eriksson*, 2 Wn. App. 228, 229, 467 P.2d 321 (1970). Regardless, the trial court found that, even with application of the presumption, plaintiffs presented sufficient evidence not only to rebut the presumption, but establish adverse use. (CP 1427-29, Findings 16-21.)

Larson essentially requests this Court to act as fact finder and weigh and construe the evidence to find that Mr. King allowed use of the turnout areas by neighborly sufferance. He compares this case to *Gamboa, supra.* But this case is factually distinguishable from *Gamboa.* First, unlike *Gamboa,* this is not a case in which the plaintiffs are using the road of another. Like *Gamboa*, many prescriptive rights claims are based upon the claimant's use of another's road without any right to use that road. *See e,g, Imrie v. Kelley,* 160 Wn. App., 49 P.3d 924 (2011); *Kunkel v. Fisher,* 106 Wn. App. 599, 23 P.3d 1128 (2001). Unlike these cases, plaintiffs used a Road on Larson's property (created pursuant to plaintiff's predecessors) pursuant to an express easement. They travel the paved road as a matter of right. There use of the turnout areas must be evaluated in that context. The trial court's unchallenged findings establish that the Road was not wide enough for two cars to past, yet it was continuously used by plaintiffs, their guests, serving contractors and delivery personnel driving all sizes of cars. Plaintiffs used the turnout areas, in a manner that was open and notorious and continuous and uninterrupted, for the purpose realizing full enjoyment of their express easement, which was granted for the purpose of ingress and egress. (CP 1422-27, Unchallenged Findings 7, 9, 10, 11, 12, 13, 14.) This does not constitute use pursuant to neighborly sufferance.

More importantly, Larson again neglects to address that a presumption of permissive may be defeated with evidence that the easement claimant interfered with the owner's use of land in some manner.[10] *Gamboa,* 183 Wn.2d at 51-52. In *Gamboa,* there was no evidence of interference. The claimant occasionally bladed road, assisting in maintenance, but they never interfered with the owner's use of the road. *Id.* at 52. In this case, the unchallenged findings establish that plaintiffs did interfere with the owner's use by removing and altering multiple large rocks that were placed in the turnout areas. (CP 1426-8, Unchallenged Findings 15, 17, 18.)

The trial court's findings are supported by the substantial evidence and, in turn, its findings support the trial court's legal conclusion that plaintiffs acquired a prescriptive easement to the two turnout areas where they interfered with King's use of the property.

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[10] Larson again focuses on whether the substantial evidence will support findings that King intended to interfere with and exclude plaintiffs' use of the turnout area. Before presenting this challenge to the court's factual findings, Larson argues, incorrectly, that plaintiffs in this case "must show 'the owner has indicated by some act his admission that the claimant has a right of easement.'" (Appellants' Brief at p. 19.) as noted earlier, proof of an act of admission by the servient owner is only one method of proving use was adverse. Adversity may be also established, and a presumption of permissiveness defeated, through evidence that the claimants interfered with the servient owner's use in some manner. *Gamboa,* 183 Wn.2d at 52.

C. The Trial Court's Findings Regarding The Parties' Intent For The 1996 Express Easement Are Supported By The Substantial Evidence And The Court Property Interpreted The Easement.

1. Applicable rules of interpretation.

In this case, the trial court was asked to review and interpret the 1996 express easement and determine its scope.

As with any contract, the Court's primary role in interpreting an easement is to determine the parties' intent when the easement was granted. What the parties originally intended is a question of fact. *Northwest Properties Brokers Network, Inc. v. Early Dawn Estates Homeowners Ass'n,* 173 Wn. App. 778, 789-90, 295 P.3d 314 (2013); *Littlefair v. Schulze,* 169 Wn. App. 659, 278 P.3d 218 (2012).

In determining intent, the Court starts its analysis with review of the language in the easement itself. "[I]f the easement is ambiguous or even silent on some points, the rules of construction call for examination of the situation of the property, the parties, and surrounding circumstances." *Northwest Properties Brokers Network,* 173 Wn. App. at 792-93.

> In determining the scope of express or color of title easements, we look to the deed's language, the intention of the parties connected with the original easement, the circumstances surrounding the deed's execution, and the manner in which the easement has been used. (Emphasis added.)

810 Properties v. Jump, 141 Wn. App. 688, 696-97, 170 P.3d 1209 (2007). *See also, Rainier View Court Homeowners Ass'n, Inc. v. Zenker,* 157 Wn. App. 710, 720, 28 P.3d 1217 (2010) (if ambiguity exists court will "review extrinsic evidence to show the original parties' intent, the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties' prior conduct or admissions.").

A written instrument is ambiguous when its terms are uncertain or capable of being understood as having more than one meaning. *Rainier View Court Homeowners Ass'n,* 157 Wn. App. at 720.

> Despite the professed emphasis on the binding effect of precise language, the parties are deemed to have contemplated the easement holder's right to do whatever is reasonably convenient or necessary in order to enjoy fully the purposes for which the easement was granted. What constitutes reasonable use is a question of fact.

Bruce and Ely, The Law of Easements and Licenses in Land, § 8:13 at p. 8-14 (2015).

2. The language of the 1996 Easement and the context in which it was signed.

The 1996 Easement interpreted by the trial court was signed by members of the King family, the Schoenfelders, the Sutton family (predecessors to the Bergmans) and members of the Marr family (predecessors to the Watermeyers). (Trial Exhibit 10.) It grants a "mutual, non-exclusive surface easement for ingress and egress across a certain

black topped road that currently exists." (*Id.*) Through the Easement, the parties agreed to "grant to each other and to each other's heirs, assigns, and successors in interests a non-exclusive easement for ingress and egress on five (5) feet on each side of the centerline across the existing black topped road which crosses their respective properties." (*Id.*)

The 1996 Easement is silent with regard to construction of fences or other structures along or on the road. But when the 1996 Easement for use of the "black topped road that currently exists" was executed, the road was unenclosed and had been used for ingress and egress by vehicles of all size, including emergency vehicles, uninhibited by any structures for the 30 preceding years since Frederick Marr paved the road in 1965. (1422-4, Unchallenged Findings 7, 10.)

Larson states that, though the private road existed and was used for years, prior to 1996, there was no formal easement. (Appellants' Brief at p. 3.) This is not true. The private road was originally built and easement rights in favor of plaintiffs' predecessors to use the road were established by 1945. (Trial Exhibit 2.) Thus, when the Kings, Larson's predecessors, purchased the property improved with the road, the property was conveyed subject to an easement for ingress and egress to the benefit of the plaintiffs' property. (Trial Exhibits 1, 2, 4.) When Lepape purchased

their property in 1968[11] and Schoenfelder purchased their property in 1986, they were conveyed their property by warranty deed together with an easement to use to existing road for ingress and egress. (Trial Exhibits 6, 8; 2/3/16 RP at 189-90.)[12]

The 1996 Easement came about when Watermeyer was purchasing their home from members of the Marr family and issues of access rights to this specific property arose. Just prior to closing, Watermeyer's lender informed them that it would not fund the transaction until a formal access agreement to use the existing road was obtained. The lender concluded from review of the prior recorded easement documents that, though the road had been used to access the property for decades, the Watermeyer property was not included in the easement grants. (2/3/16 RP at 228-29.)

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[11] Lepape received their fulfillment deed in 1986 (Trial Exhibit 6), but they acquired possession of the property in 1968 when the purchased the property on a real estate contract. (2/3/16 RP 188-89.)

[12] Larson also incorrectly states that Lepape does not have an express easement to use the road. Because Lepape already held access rights under prior easement documents, including their warranty deed recorded under Pierce County Auditor File No. 8105090221 (Trial Exhibit 6), Lepape elected not to sign the 1996 easement. Thus, the trial court found in the unchallenged Finding of Fact 9: "The Lepape Property is also benefitted by and the Encumbered Larson Parcels are encumbered by an express easement to use the Road as granted in the warranty deed recorded under Pierce County Auditor File No. 810509221 and easements previously recorded under Pierce County Auditor Files Nos. 13544311 and (Trial Exhibits 2, 4 and 6.)" (CP 1423.) The trial court, on summary judgment, did hold that another easement document did not grant Lepape an easement over Larson Property (CP 670), but that easement is not relevant to this appeal. The parties stipulated that the Court would determine the parties easement rights based upon the 1996 Easement recorded under Auditor File No. 9608070162 (Trial Exhibit 10), the Lepape Warranty Deed recorded under Auditor File No. 8105080221 (Trial Exhibit 6) as well as other easement documents. (CP 459; *see also* 2/10/16 RP 70-71; 2/11/16 RP at 28-29.)

There is no evidence in the record that prior express easement did not effectively create access rights across the road for the benefit of the Schoenfelder, Lepape or Bergman properties.

Larson repeatedly described the easement as a "negotiated agreement, but he cites to no evidence of any negotiations.[13] To the contrary, the 1996 Easement was, prepared, presented and executed quickly to facilitate the imminent closing for Watermeyer's purchase of their home. Watermeyer does not know who prepared the 1996 Easement. (2/3/16 RP at 227-29.) Signatures from the neighbors were obtained from the neighboring property owners by a mobile notary. (2/3/16 RP at 229-30.) The 1996 Easement was presented to the neighbors as necessary to confirm access rights to the Watermeyer property so their purchase could close. (2/3/16 RP 82.) Dr. Watermeyer understood that the easement, which was signed by the Marrs as the sellers, "allowed me to get to my house." (2/10/11 16 RP at 35.) The Watermeyers were "happy to get it" so they could close their loan. (*Id.*; 2/3/16 RP at 228-30.)

It was in this context in which the 1996 Easement was signed. It was intended to confirm the long, historical use of the private road for

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[13] To the contrary, to support their argument challenging plaintiffs' prescriptive easement rights, Larson makes much ado about the fact that the King children had virtually no communications with any of the plaintiffs. Of course, the King children, along with John Sr. and Doris King signed the 1996 Easement. (Trial Exhibit 10.)

access to the Watermeyer and the other plaintiffs' homes. By the time the 1996 Easement was signed, this long (700 feet), narrow (10 feet) and curvy road,[14] which was paved in 1965,[15] had been unenclosed[16] and used for decades by four families for ingress and egress. The trial court found:

> For years, the Road has been used by four families, with many vehicles going up and down the Road between plaintiffs' properties and Kopachuck Drive, including vehicles driven by family members, family member's guests, delivery and services persons and emergency service vehicles. The Lepapes have used the road since 1968; the Schoenfelders since 1987, the Watermeyers since 1986; and the Bergmans since 2004.[17]

(CP 1424, Unchallenged Finding 10. *See also,* CP 1422-23, Unchallenged Finding 7.)

With consideration of the above-described evidence the trial court made the following Findings of Fact regarding the 1996 Easement now challenged by Larson:

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[14] CP 1422, Unchallenged Finding 7.

[15] 2/3/16 RP at 198.

[16] CP 1423, Unchallenged Finding 8.

[17] The Watermeyer and Bergman homes were occupied by members of the Marr family, and the road was used to access those homes, long before Watermeyer and Bergman purchased their respective roads. (*See* CP 1422-23, Unchallenged Finding 7.) Recall that the road was first paved in 1965 by Frederick Marr when he constructed the permanent residence now occupied by Bergman (and occupied by the Suttons at the time the 1996 Easement was signed. (2/3/16 RP at 198; CP 1421, Unchallenged Finding 2, Trial Exhibit 10.) Watermeyer purchased their property from the Marr family, which was occupied by a cabin also built by Frederick. (2/3/16 RP at 196-97, 225-26, 230-31.)

23. The Court finds that plaintiffs, pursuant to the 1996 Easement, have an express easement for a ten-foot wide paved road and that the purpose of the 1996 Easement is to provide ingress and egress. The 1996 Easement is silent with regard to the erection of a fence or any other structure along or near the 10-foot easement area and, thus, is ambiguous in that regard. Accordingly, the Court may and did consider, in addition to the language used in the 1996 Easement, testimony and evidence regarding the situation of the property and parties, including the physical attributes of the Road and the parties' course of use of the Road to interpret the express easement consistent with its intent and to allow the full enjoyment of the purpose of the easement.

24. The evidence, which includes the testimony of plaintiffs and Fire Chief John Burgess, established that the width of the paved surface is sufficient for plaintiffs to fit all four wheels of their respective vehicles on the 10-foot wide Road, and is also sufficient for emergency vehicles, which are 8 feet six inches in width, to fit all four wheels on the Road. However, in light of the curvature of this Road that exceeds 700 feet in length, if a fence or other structure is erected at the edges of the Road, or any location closer than 2½ feet from either edge of the Road (such that the structure allows less than 15 feet of airspace), it will preclude a single vehicle traveling one way, particularly fire trucks, emergency service vehicles and other large vehicles, from maneuvering the curves of the Road and traversing the full length of the Road without interference. The compelling evidence established that such a fence or structure would materially interfere with the intended purpose of the 1996 Easement, which is to provide ingress and egress to plaintiffs' properties, and would deprive plaintiffs of full enjoyment of their express easement.

25. A restriction on the erection of a structure within 2½ feet of the easement edges does not expand the 1996 Easement for a 10-foot wide paved road.

> Plaintiffs' use of the surface of the Larson Property is limited to the 10-foot wide easement area as provided in the 1996 Easement, with the exception of use pursuant to plaintiffs' prescriptive rights to use the two turnout areas. This limitation on the erection of physical structures within 2½ feet of the Road is, however, the minimum restriction necessary to effectuate and implement the express purpose and allow plaintiffs full enjoyment of the 1996 Easement. The Court's finding the 1996 Easement, which is silent regarding structures, necessarily restricts and precludes structures that will interfere with the purpose and preclude reasonable enjoyment of the easement is a reasonable interpretation of the 1996 Easement and consistent with its intent.
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> 26. The testimony and evidence also establishes that a fence closer than 2 ½ feet of the outer edge of the two turnout areas labeled A and B on Exhibit 3 would also interfere with full enjoyment and the purpose of their prescriptive easement, which is to allow them to pull entirely off the road and allow oncoming vehicles of varying sizes to pass.

(CP 1429-31 (emphasis added).)[18] The trial court's findings and conclusions are supported by the substantial evidence and the law.

3. The substantial evidence supports the trial court's finding that the 1996 Easement was ambiguous with regard to the construction of a fence on or along the road.

Larson first argues that the trial court erred in finding that the 1996 Easement was ambiguous with regard to the construction of structures. Larson argues:

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[18] To protect Larson, the trial court ruled that its restriction on construction of a fence shall not be the basis for a prescriptive easement. (CP 1438, Conclusion 15.)

> "There is no ambiguity in this easement: It provides a 10 foot easement for ingress and egress. What the court was presented with was an omission."

(Appellants' Brief at p. 23.) But silence on an issue in an express easement can support a finding of ambiguity and allow the court to examine the situation of the property, the parties, and surrounding circumstances. *Northwest Properties Brokers Network, supra,* 173 Wn. App. at 792-93; *Rupert v. Gunter,* 31 Wn. App. 27, 31, 640 P.2d 36 (1982). This, of course, is logical, since there are no express terms with regard to structures to interpret.

Even Larson seems to acknowledge that an omission in a written contract allows consideration of evidence beyond the language of the Easement. Larson states: "Where there is a material omission in a contract, it is the duty of the court to determine the intention of the parties by viewing the contract as a whole and considering all of the circumstances leading up to its execution, including the subject matter and the subsequent acts and conduct of the parties." (Appellants' Brief at p. 23.)[19]

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[19] Larson cites *Kwik-Lok Corp v. Pulse,* 41 Wn. App. 142, 702 P.2d 1226 (1985), which did not interpret an easement, but a contract that contained a material omission regarding breeding rights for a stallion. Regardless, the case confirms that it is appropriate for a court to consider parol evidence to determine the parties' intent on issues where the contract is silent. In fact, the court in *Kwik-Lok* held that it was error for the trial court not to consider parol evidence when construing the contract to address the missing term. *Id.* at 147-48.

Here, the 1996 Easement was unquestionably silent with regard to construction of any fence or structure on or along this road.

Moreover, the 1996 Easement provides that it grants ingress and egress over a road that "currently exists." (Trial Exhibit 10.) Given that language, consideration of the road, as it then existed and was used was not only appropriate, but necessary to determine the intent of the parties. Again, when the 1996 Easement was executed, and all times before the Easement was executed, the long, narrow, curvy road existed unenclosed and uninhibited by any structures; and it was used for decades by vehicles of all sizes, including emergency vehicles. (CP 1422-4, Unchallenged Findings 7, 10.) The trial court correctly concluded that the 1996 Easement was ambiguous with regard to construction of new structures along or near the previously existing road and appropriately considered the circumstances surrounding the easement.

4. The substantial evidence supports the trial court's findings regarding the intent and scope of the 1996 Easement.

> Whether or not the owner of land, over which an easement exists, may erect and maintain fences, bars or gates across or along an easement, way, depends on the intention of the parties connected with the original creation of the easement, as shown by the circumstances of the case; the nature and situation of the property subject to the easement; and the manner in which the way has been used and occupied.

Northwest Properties Brokers Network, 173 Wn. App. at 792, *quoting Rupert v. Gunter, supra,* 31 Wn. App. at 30-31; *Evich v. Kovacevich*, 33 Wn.2d 151, 162, 204 P.2d 839 (1949). Applying the above rule of interpretation, the substantial evidence in the record supports the trial court's finding that the intent and purpose of the 1986 Easement was for ingress and egress and construction of a fence along the road would interfere with the purpose and intent of the easement.

First, the physical attributes of the road support the trial court's finding. This 700-foot long road is narrow and curvy. (CP 1422, Unchallenged Finding 7. *See also,* Trial Exhibits 20A, 23 and 23A for photographic and video depictions of the road.) The historical use of the road likewise supports the trial court's findings. For years, the road was used by four families, "with many vehicles going up and down the Road between plaintiffs' properties and Kopachuck Drive, including vehicles driven by family members, family member's guests, delivery and services persons and emergency service vehicles." (CP 1421, Unchallenged Finding 10.) There is no dispute that, for the entire duration of the paved road's 30-year historical use, it was unenclosed and uninhibited by physical structures. (*See also* CP 1423, Unchallenged Finding 8.)

The substantial evidence also establishes the intent and purpose of the easement, which is for ingress and egress for four families, cannot be

achieved and enjoyed if a fence is constructed along or immediately near the edges of the road. Among the evidence considered by the trial court in this regard, was the testimony of the local fire chief. (CP 1430-31, Findings 24, 25.)

Larson attempts to discredit the trial court's consideration of this and other evidence, by asserting that the trial court was not interpreting the easement, but, according to Larson, addressing a new access need by the plaintiffs. Larson further asserts, that there was no "need" to restrict fencing because Larson offered to construct another access road in a different location of Larson's choosing. (Appellants' Brief at p. 27.) But Larson mischaracterizes the trial court's analysis. The trial court considered the Fire Chief's testimony in the context of the purpose and historical use of the easement to determine. The trial court considered the testimony to determine if a fence constructed on the easement edge would interfere with reasonably enjoyment of the easement in light of its purpose and historical use.

Contrary to their argument, Larson's "offer" to relocate the road, and the circumstances surrounding that "offer," further corroborates the trial court's finding that a fence situated at the edge of the road will interfere with enjoyment of the 1996 Easement consistent with its purpose and intent.

The "offer" to relocate the road was presented by the existing road that plaintiffs used for decades interfered with Larson's original development plans. Larson intended to build a home, barn and recreational structures where the road and easement is currently located. (CP 1431, Unchallenged Finding 27.) As a result, prior to closing the property, Larson endeavored to persuade plaintiffs to relocate their road. Due to safety concerns, plaintiffs were not receptive to the proposed alternate road. (*See* 2/3/16 RP at 85-86, 103-06, 209-11.)

Faced with resistance to the desire to relocate the road, Larson's agent, Rob Mitchell, contacted the local fire district to specifically inquire if installation of fencing on the edges of the road would impair emergency access. Mitchell's inquiry, combined with Larson's acts to stake the edges of the road resulted in a letter from the local Fire Chief. (Trial Exhibits 46, 47.) In this letter, the Fire Chief informed plaintiffs that the district was contacted by Mitchell and informed that the road had been staked and the owners planned to construct a fence along the edges of the road. (Trial Exhibit 47.) The Fire Chief further informed plaintiffs:

> The purpose of this letter is to let everyone involved that construction of any fence along the easement, which is only ten-feet wide, would significantly impact our ability to provide emergency services to those neighbors who use the road as sole access to their properties. Our fire engines and our ambulances measure eight feet, six inches in width. With doors

> open to access equipment, they are at least ten feet wide. Due to curves in the road and design of the vehicles, if a fence is built along the entire easement road, we would not be able to take either an engine or ambulance down that road without destroying the fence and severely damaging our apparatus. In the event of a fire at the end of the easement, we would be compelled to lay over 1,000 feet of hose down the road, which would slow the response a great deal. Potentially, any fully involved house fire would mean a total loss and we would at best be protecting the surrounding exposures (any structures or combustible material on all four sides of that burning residence. A fence along the easement would significantly hamper our emergency operations.

(Trial Exhibit 47.)[20]

The Fire Chief testified at trial and confirmed the information previously communicated to plaintiffs -- that fencing the road edges would impede emergency access and endanger property and lives. (2/3/16 RP at 141-150.) He testified that, to allow emergency access, the 10-foot paved area was sufficient for emergency vehicles, but airspace of 2½ feet on either side of the paved road, was required to maneuver the curvature of this 700-foot long road. (*Id.* at RP 141-45.)

The trial court found that Larson, though their agent Mitchell, used the threat of a fence along the road edge, and the threat of impaired emergency access that would accompany such a fence, to leverage

[20] The trial court initially denied admission of Trial Exhibit 47, opting to rely on the Fire Chief's testimony. (2/3/16 RP at 150.) The trial court later admitted the Trial Exhibit 47 when Ms. Lepape testified and confirmed receipt of the letter. (2/3/16 RP at 212-13.)

plaintiffs to relocate their road. (CP 1431-32, Findings 28-29.[21] *See also,* Trial Exhibits 35, 34, 36, 39, 46; 2/4/16 RP at 46-56, 58-59; 201-03; 2/3/16 at 93-98, 100-102; 2/10/16 RP at 72-76, 78-87.) Admittedly, the evidence was relevant to support the trial court's decision with regard to the spite fence claim, which is not at issue on this appeal. But the evidence (and the court's findings) is also relevant to and supports the trial court's findings on the issue of whether a fence situated at the road's edge will interfere with enjoyment of the easement consistent with its intent and purpose, which is to provide ingress and egress for four homes.

Again, the trial court found that this road had been used for decades, unenclosed, for access to family homes. This historical use has included access by emergency vehicles, as well as other large vehicles. (CP 1424, Unchallenged Finding 10.) The trial court reasonably found, with consideration of the easement's purpose to provide the ingress and egress to family residences, the road's physical attributes and historical

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[21] Larson assigns error to these findings, but offers no argument to establish that they are not supported by the substantial evidence. Instead, Larson unilaterally asserts in a footnote that testimony and evidence regarding Larson and Mitchell's efforts to leverage relocation of the fence are not relevant to this appeal. (Appellants' Brief at p. 1, n.1.) But later in their brief, Larson makes the findings relevant to this appeal by asserting that there was no need to a fence restriction, since Larson offered an alternative road, albeit unacceptable to plaintiffs. (*Id.* at p. 27.) Regardless, assignments of error not supported by argument are generally not considered. *Seattle School District No. 1 v. State,* 90 Wn.2d 476, 496, 585 P.2d 71 (1978). Moreover, the substantial evidence in the record supports the trial court's findings. (*See e.g.,* Trial Exhibits 35, 34, 36, 39, 46; 2/4/16 RP at 46-56, 58-59; 201-03; 2/3/16 at 93-98, 100-102; 2/10/16 RP at 72-76, 78-87.)

use of the road, that the parties intended the easement to include access for emergency vehicles. (CP 1429-30, Findings 23, 24, 25.) Such access could have and has been provided without expanding width of the surface pavement; and the court did not expand the width of the surface of the road. But the trial court also found that construction of physical structures that impede immediate airspace would also impede emergency and other large vehicle access. Such impediment would interfere with enjoyment of the intent and purpose of the 1996 Easement and was thus prohibited by the 1996 Easement as interpreted by the trial court. (*Id.*)

Larson states at page 25 of the opening brief that "Washington courts have encountered all widths of ingress and egress easements, many that are less than the 15 feet plaintiffs wanted here." None of the cited cases involve interpretation of the subject easements, much less address issues even similar to those presented here. [22] Moreover, the trial court did not interpret the 1996 Easement to be a 15-foot easement. The trial court found that the 1996 Easement granted a 10-foot wide paved easement and

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[22] Larson string cites cases, noting the width of each subject easement, but none of the cited cases present, much less address any of the issues presented here. *Winsten v. Prichard,* 23 Wn. App. 428, 597 P.2d 415 (1979) (determining whether easement was appurtenant or in gross and whether easement had been abandoned by nonuse): *Noble v. Safe Harbor Family Preservation Trust,* 141 Wn. App 168, 169 P.3d 45 (2007) (addressing attorney fee award in private way of necessity action); *Friends of Cedar Park Neighborhood v. City of Seattle,* 156 Wn. App. 633, 234 P.3d 214 (2010) (upholding calculation of minimum required easement under local code in Land Use Petition Act Appeal); *Griffen v. Draper,* 32 Wn. App 611, 649 P.2d 123 (1982) (addressing validity of contempt order).

nothing in the trial court's decision regarding the express easement widens the road surface upon which plaintiffs may drive.[23] (CP 1429-30, Finding 23.) The trial court then interpreted the express, which was silent on the issue of fencing, and found that, based on the evidence, a fence situated at the edges of the road would interfere with the intended use of the 10-foot paved road easement.

The trial court found instructive the unpublished Tennessee Court of Appeals case, *Carroll v. Belcher,* 1999 WL 58597 (Tennessee Court of Appeals 1999).[24] Though neither binding nor precedent for this Court, respondents request this Court to consider the *Carroll* court's decision and analysis.

While the *Carroll* court addressed a prescriptive easement (which the trial court acknowledged),[25] the decision is founded on a legal

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[23] The trial court held that the turnout areas were not included in the scope of the express 1996 Easement because, to interpret the easement to include the right to drive in the turnout areas would contradict the language limiting the driving surface to 10 feet. Plaintiffs' right to use two of four turnout areas was based upon prescriptive, rather than express easement rights. (CP 669-70; 2/17/16 RP at 12; CP 1436-38, Conclusions 10-15.)

[24] Pursuant to Rule 11 of the Tennessee Court of Appeals, court of appeals decisions that are not appealed to the Supreme Court are not generally published the case establishes new rules of law or alters, criticizes, conflicts or clarifies existing rules of law. Pursuant to Rule 12, citation to unpublished decisions is not prohibited. While Washington General Rule 14.1(A) prohibits citation to unpublished Washington court of appeals decisions, subsection (B) does not preclude citation to unpublished decisions from other jurisdictions if allowed by that jurisdiction. The trial court was presented with these rules, along with a copy of the case, when this Tennessee case was presented in argument. (2/3/16 RP at 59-60, 146.) A copy of the *Carroll* decision and Tennessee Rules 11 and 12 are attached as Appendix A.

[25] CP 1434, Conclusion 6.

principal applicable to all easements and recognized by Washington courts. Specifically, that the servient estate cannot interfere with the lawful use of the easement by the owner of the dominant estate.

> The owner of the servient estate ... cannot make any alterations in his property by which the enjoyment of the easement will be materially interfered with.

Id. (at Appendix A-5), *quoting* 28(A) CJS *Easements,* § 175 (1996).

Applying this law, the *Carroll* court concluded:

> From the proof in the record, it is shown that Belcher's placing of the fence on the boarder of the easement of eight to ten feet materially interferes with the use of the easement by the owners of the dominant estate. The terrain over which the easement runs is wooded, and the easement is not straight. This makes it somewhat difficult in close quarters to drive a vehicle without striking the fence. Accordingly, some relief should be granted to the owners of the dominant estate in the use of the easement.

(*Id.*) The court held that it was thus appropriate to limit construction of a fence to no closer than two feet from the road edge. *Id.*

The California case of *Kosich v. Braz,* 56 Cal. Rptr. 737, 247 Cal. App.2d 737 (1967) is also instructive. There, the court addressed a 12-foot easement. However, due to a 90 degree turn along the easement road, it was not possible for a driver to access the property without traveling outside the 12-foot easement area. Thus, over a substantial period of time, vehicles traversed outside the easement area. Like here, the servient estate holder attempted to confine the easement beneficiary to the 12-foot width

of the easement by installing an interfering structure. The court held that strictly limiting the easement to 12 feet would frustrate the intention and purpose of the easement, which is to provide ingress and egress. *Id.* at 739. This case should yield the same result. *See also, Carson v. Elliott*, 111 Idaho 889, 890, 728 P.2d 778, 779 (Ct. App. 1986) ("[T]he easement owner is entitled to full enjoyment of the easement. In the case of an access easement to a dwelling, such enjoyment includes not only a right of ingress and egress, but also an implied right to turn vehicles around."); *Sordi v. Adenbaum,* 533 NYS2d 566, 143 AD.2d 898 (1988) (holding easement is not limited to the dimensions reflected in the metes and bounds legal description where such limitation would defeat the basic purpose of the easement.)

The trial court's decision was not a decision to expand the 1996 Easement based upon some new "need." The trial court did not expand the Easement at all, specifically maintaining the 10-foot limitation to the surface width. Rather, the trial court resolved ambiguities on issues for which the 1996 Easement was silent based upon a reasonable determination of the purpose and intent of the 1996 Easement formed in the context of its language, physical attributes, and historical use. The trial court's interpretation was supported by the substantial evidence and consistent with applicable rules of easement interpretation. The trial

court's interpretation did not contravene the limitation on the road surface width, but, by imposing the minimum restriction necessary, still allowed the easement to be used consistent its purpose and consistent with the longstanding historical use.

CONCLUSION

The trial court's decisions regarding both plaintiffs' prescriptive easement and express easement rights are well supported by the substantial evidence and the law; and its decisions should be affirmed.

Dated this 25 day of January, 2017.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By _____
Margaret Y. Archer, WSBA No. 21224
Attorneys for Respondents/Plaintiffs

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on January 25, 2017 I did serve via email a true and correct copy of the foregoing by addressing and directing for delivery to the following:

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Margaret Archer

APPENDIX A

1999 WL 58597
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Gordon CARROLL and Ora Hall,
Plaintiffs-Appellees,
v.
John W. BELCHER and Frankie Belcher,
Defendants-Appellants.

No. 01A01-9802-CH-00106.
|
Feb. 9, 1999.

From the Chancery Court of Wilson County, C.K. Smith, Chancellor.

Attorneys and Law Firms

Alan Poindexter, Rochelle, McCullough & Aulds, Lebanon, for Appellees.

Michael R. Jennings, Lebanon, for Appellants.

Opinion

CRAWFORD.

*1 This appeal involves an easement for ingress and egress. The defendants, John and Frankie Belcher (Belcher), appeal the decision of the trial court granting the plaintiffs, Gordon Carroll (Carroll) and Ora Hall (Hall), the right to widen an easement running over their property.

This dispute arises from the attempts of Carroll, owner of the dominant estate, and Hall, his vendee under a sales contract, to widen an easement for the ingress and egress over Belcher's property, the servient estate. Carroll is the owner of approximately 16 acres of property that has no road frontage. Access to Carroll's property is obtained through an easement located on land Belcher has owned since 1954. This easement has been used by Carroll and previous owners of Carroll's property to reach the road for well over 50 years.

Although no deed described the easement, Belcher and other witnesses stated that it had been an old wagon road prior to being used by automobiles. The easement itself was described by witnesses at trial as approximately eight to ten feet wide and traveling approximately six hundred feet across Belcher's property. The easement was a dirt and gravel road wide enough for automobiles to move to and from Carroll's land.

Carroll purchased the land in 1997. Carroll and Hall subsequently entered into a land installment sales contract which required Hall to pay the full amount of the purchase price before receiving the deed. Hall and James Moon (Moon) presently occupy the residence located on Carroll's land.

In July, 1977, shortly after acquiring possession of the property, Moon, apparently on behalf of Hall, commenced to widen the easement. This work was undertaken without the knowledge or permission of Belcher, who, at that time, was in the hospital. Using a bulldozer, Moon moved debris onto Belcher's land and made various ruts through Belcher's land off of the existing right of way. The testimony indicated that it was Hall's intention to widen the easement to fifty feet. Belcher returned from the hospital, and, when he found out what had happened, he erected fences along the easement's historical boundaries which were approximately eight to ten feet in width.

Hall and Carroll then filed a petition for temporary and permanent restraining order to keep Belcher from interfering with or preventing Carroll and Hall's use of easement. The complaint avers that the defendants, Belcher, had constructed and erected posts within the premises of the easement and that the posts restricted entry and exit to the residence on the property and have caused damage to the motor vehicles using the easement. The complaint seeks a temporary restraining order and a permanent injunction to restrain the defendants from interfering with or preventing the use of the easement as a driveway access through the Carroll/Hall property. Plaintiffs also seek an injunction to require removal of any obstacles from the easement to and from the property.

Defendants' answer admits that there is an easement across the property and admits that defendants have constructed and erected posts but avers that they have been erected on the edge of the easement and do not obstruct the right of way provided by the easement. The defendants aver that the posts and fence were placed at the edge of the easement that has been used for over fifty years.

*2 The case was tried by the court without a jury, and the court entered an order on October 31, 1997 containing findings of fact and states as follows:

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This cause came on to be heard for trial on October 15th, 1997 before the Honorable C.K. Smith, Chancellor for Wilson County, Tennessee, and with all parties before the Court and after due consideration of all sworn testimony and documentary evidence, the Court does find as follows:

Findings of Fact

1. That the Plaintiff, Gordon Carroll, is the owner 16.18 acres located of Thomas Road in northern Wilson County, Tennessee.

2. That the 16.18 acre tract Plaintiff owns has no frontage on a public road.

3. That historically, access to and from the 16.18 acre tract is by an unrecorded and undefined easement across Defendants' lands.

4. That the Defendants are owners of the servient tenement.

5. That the Plaintiff, Gordon Carroll, is the owner of the dominant tenement.

6. That the historical width of the aforesaid easement has been anywhere from eight to ten feet wide.

7. That the historical use of the aforesaid easement has been for ingress and egress to the Plaintiff's tract.

8. That the aforesaid easement does not materially affect the Defendants' use and enjoyment of their land.

9. That due to the requirements of modern vehicles, e.g. ambulances, fire trucks, delivery vehicles, etc, an easement of fifteen feet is required so that vehicle may ingress and egress the Plaintiff's property with adequate space.

10. That increasing the width of the easement does not materially increase the burden on the servient tenement so long as the scope of the use is limited to ingress and egress.

Conclusions of Law

1. The Plaintiff, Gordon Carroll, is entitled to a fifteen foot wide easement across Defendants' land from Thomas Road to Plaintiff's 16.18 acre tract.

2. Plaintiff's use of the easement is limited to ingress and egress to and from his property.

3. Plaintiff may make repairs and improvements to the area within the easement boundaries.

4. If Plaintiff must cut trees or remove timber, the Defendants will be compensated for such material.

5. Should Plaintiff damage the Defendants' property outside the easement boundaries, then Plaintiff shall compensate the Defendants for such damage.

6. The centerline of the easement shall be located as near as possible to the centerline of the historical easement. The easement's width shall extend seven and one-half feet perpendicular from each side of the centerline.

7. The Defendants are permanently restrained and enjoined from erecting any structure or obstacle that would interfere with the easement being fifteen feet.

8. Should the Plaintiff or his agents determine that trees within the easement boundaries must be cut, no cutting shall occur until a value for the trees has been mutually agreed upon by the parties hereto or established by the Court.

9. The Plaintiff is liable to the Defendants for damages caused to the Defendants' property, to-wit: ruts, debris, etc. by the Plaintiff's agents. The Defendants are entitled to $1,000.00 in damages for this act.

*3 10. In the event the parties cannot mutually agree to the location of the centerline of the easement or boundaries thereto, the Clerk & Master shall, at the request of either party, appoint a surveyor licensed by the State of Tennessee to determine the easement's centerline and mark the boundaries of the easement. The parties shall each bear one-half the cost of such survey.

11. The costs of this action are taxed to each party one-half each.

12. Execution of the judgment of the Court is stayed for thirty days from entry of this Order. Should either party appeal the decision of this Court, then the execution of the judgment of this Court shall be stayed until a decision is rendered by the Tennessee

Court of Appeals.

Belcher appeals the trial courts ruling and in his brief asks this Court to consider the following issues.

1. Can the width of an easement for ingress and egress be enlarged after its limits have been defined by practical construction and many years of use?

2. Can the width of an easement, established by historical use and location, be increased arbitrarily due to the requirements of "modern vehicles"?

3. Is the trial court's decision supported by the evidence?

These issues will be considered together. Since this case was tried by the trial court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. T.R.A.P. 13(d).

We agree with the trial court's findings of fact except for numbers nine and ten. From our review of the record, we do not find evidence that an easement of fifteen feet is required for ingress and egress through the dominant estate. We also do not agree that increasing the width of an easement does not increase the burden on the servient estate since taking additional property would appear to be an undue burden.

Although the trial court found that the easement must be fifteen feet wide in order to accommodate modern vehicles such as ambulances and fire trucks, no evidence was presented at trial that would substantiate this finding. In fact, the only testimony concerning the adequacy of the easement for modern vehicles was that of Belcher who stated that Carroll had driven a large timber truck loaded with gravel along the easement.

The proof in the record is that the easement as used, approximately eight to ten feet in width, has been providing adequate ingress and egress for vehicular traffic to the property. After the owners of the dominant estate started bulldozing the easement to widen it and thus encroach upon the servient estate, the owner of the servient estate placed a fence on the border of the easement as used which apparently was from eight to ten feet in width. This created some difficult in using the easement because of the close proximity of the fence, and the parties turned to the courts to resolve this unfortunate dispute between neighbors.

*4 We must determine whether the trial court erred in widening the easement as it had been used historically. After a complete review of the record and for the reasons hereinafter stated, we find the trial court did err in that regard.

"An easement is a right an owner has to some lawful use of the real property of another." *Pevear v. Hunt,* 924 S.W.2d 114, 115 (Tenn.App.1996). The case at bar involves an easement appurtenant, as there are two tracts involved. Belcher's property, as the servient tenement, benefits Carroll's property, the dominant tenement.

In 10 Tennessee Jurisprudence, *Easements* § 6 (1994) it is stated:

> Although the rights of the easement owner are paramount, to the extent of the easement, to those of the landowner, the rights of the easement owner and of the landowner are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both the easement and the servient estate.
>
> The extent of an easement is determinable by a true construction of the grant or reservation by which it is created, aided by any concomitant circumstances which have a legitimate tendency to show the intention of the party....
>
> *The extent of an easement is also determinable by its nature and use.* (emphasis added)

Our Supreme Court has stated the general rule regarding changes in easements of ingress and egress by the dominant estate:

> '[T]he owner of an easement of way may prepare, maintain, improve, or repair the way in a manner and to an extent reasonably calculated to promote the purposes for which it was created or acquitted, *causing neither an undue burden upon the servient estate, nor an unwarranted interference with the rights of common owners or the independent rights of others.*'

Mize v. Ownby, 225 S.W.2d 33, 35, 189 Tenn. 207 (1949) (emphasis added).

To allow Carroll to expand the easement to fifteen feet, will, in effect, grant Carroll the right to take approximately 3000 square feet of Belcher's property. This appears to be an "unwarranted interference" with Belcher's rights, and as such, causes an undue burden upon him.

While it is true that neither the deed nor other writing

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defined the boundaries or width of the easement, the testimony at trial indicated that it was no more than ten feet wide. The easement has been used for ingress and egress from the property presently owned by Carroll for more than fifty years, and the width has remained constant. When Carroll bought the property the easement was clearly visible. The only evidence in the record concerning Carroll's contention that the easement is not wide enough for modern vehicles are photographs taken by him. These photographs show an unimproved, one-lane road approximately ten feet wide. These same photographs also show a sports utility vehicle on the easement with room to spare on either side. From the evidence in the record, it seems clear that the easement is able to handle modern vehicles.

*5 By the same token, the owner of the servient estate cannot interfere with the lawful use of the easement by the owner of the dominant estate. In 28(A) CJS *Easements,* § 175, (1996) it is stated:

> The owner of the servient estate ... cannot make any alternations in his property by which the enjoyment of the easement will be materially interfered with.

From the proof in the record, it is shown that Belcher's placing of the fence on the border of the easement of eight to ten feet materially interferes with the use of the easement by the owners of the dominant estate. The terrain over which the easement runs is wooded, and the easement is not straight. This makes it somewhat difficult in close quarters to drive a vehicle without striking the fence. Accordingly, some relief should be granted to the owners of the dominant estate in the use of the easement.

Accordingly, the order of the trial court is modified to define the easement as ten feet wide but if Belcher determines that fences should be erected along the easement, the fences shall be erected at least two feet outside of the sidelines of the ten foot easement, and Belcher is enjoined from erecting any structure or obstacle within this two foot area.

As modified, the order of the trial court is in all other respects affirmed. Costs of the appeal are assessed against the appellee.

HIGHERS and FARMER, JJ., concur.

All Citations

Not Reported in S.W.2d, 1999 WL 58597

End of Document

RULE 11: PUBLICATION OF OPINIONS WHERE NO APPLICATION FOR PERMISSION TO APPEAL TO THE TENNESSEE SUPREME COURT IS FILED

Rule 11. Publication of Opinions Where No Application for Permission to Appeal to the Tennessee Supreme Court Is Filed.

(a) Opinions of this Court, including abridgements thereof, from which no application for permission to appeal to the Tennessee Supreme Court has been filed, shall be published only with the approval of this Court as provided for herein.

(b) An opinion of this Court from which no application for permission to appeal to the Tennessee Supreme Court has been filed shall be published only if, in the determination of the members of this Court, it meets one or more of the following criteria:

(1) The opinion establishes a new rule of law or alters or modifies an existing rule or applies an existing rule to a set of facts significantly different from those stated in other published opinions;

(2) The opinion involves a legal issue of continuing public interest;

(3) The opinion criticizes, with reasons given, an existing rule of law;

(4) The opinion resolves an apparent conflict of authority;

(5) The opinion updates, clarifies or distinguishes a principle of law; or

(6) The opinion makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

(c)

(1) An opinion of this Court, or an abridgement thereof, from which no application for permission to appeal to the Tennessee Supreme Court has been filed may be

submitted to this Court for consideration for publication only after the expiration of the period of time permitted by the Tennessee Rules of Appellate Procedure to apply to the Tennessee Supreme Court for permission to appeal. Along with the opinion, the author shall state the reasons why the publication of the opinion is appropriate.

(2) If within thirty (30) days of the date an opinion has been submitted to all members of this Court, seven (7) members have approved publication of the opinion, the presiding judge shall notify the author of the opinion in writing that the opinion may be published.

(3) Approvals or objections to the publication of an opinion shall be made in writing and shall be sent to the presiding judge within thirty (30) days after the opinion has been submitted to the members of this Court. Where no written response is received from a member of this Court within thirty (30) days, the lack of response shall be treated as an affirmative vote for publication. The presiding judge shall, upon request, share the substance of the responses with the author of the opinion.

(d) Any judge of this Court may make minor editorial changes in an opinion authored by that judge once the opinion has been filed. These changes may include corrections in spelling, punctuation, or syntax. However, any abridgement that significantly alters the sense or emphasis of an already filed opinion shall be submitted to this Court prior to publication.

(e) In cases wherein concurring or dissenting opinions have been filed, the author of the concurring or dissenting opinion shall determine whether the concurring or dissenting opinion should be published with the majority opinion or whether only the position of the concurring or dissenting judge should be noted.

RULE 12: CITATION OF UNPUBLISHED OPINIONS

Rule 12. Citation of Unpublished Opinions.

(a) A party is not required to furnish the court with a copy of an unpublished opinion if the unpublished opinion is available from an Internet-based electronic database (e.g., Westlaw or Lexis) and if the citation to the unpublished case includes both the appropriate citation to the electronic database and the information required by paragraph (b) of this Rule. The party citing an unpublished opinion shall, within five (5) days of a written request, provide a copy of the unpublished opinion to any other party. In the event an unpublished opinion cited by a party is not available from an Internet-based electronic database, a copy of the unpublished opinion, with the notation required by paragraph (b) of this Rule, shall be furnished to the court and all other parties by attaching it to the document in which it is cited.

(b) The citation to any unpublished decision relied on by a party, as well as the title page of any copy of a decision for which an electronic database citation is not available, shall contain either a notation that no appeal has been filed or a notation of the date and manner in which the application for permission to appeal has been decided. Where appropriate, this shall include a notation that an appeal has been applied for but has not been decided.

[Amendment adopted effective June 17, 2015, filed July 10, 2015].